

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

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| FRANK SEXTON ENTERS., INC. | : | |
| t/a SOMMER MAID | : | |
| | : | CIVIL ACTION |
| v. | : | |
| | : | NO. 97-7104 |
| SOCIETE DE DIFFUSION | : | |
| INTERNATIONALE AGRO-ALIMENTAIRE | : | |
| (SODIAAL), et al. | : | |

MEMORANDUM ORDER

Plaintiff filed this action in state court against defendants Societe de Diffusion Internationale Agro-Alimentaire ("SODIAAL-France"), SODIAAL North America Corporation ("SNAC") and Keller's Bar/Hotel ("Keller's"), asserting claims for breach of contract, tortious interference with economic relationships and violations of the Robinson-Patman Act. Defendants removed the case to this court based on the presence of federal question jurisdiction in view of the Robinson-Patman Act claim.

Presently before the court is defendant SODIAAL-France's motion to dismiss plaintiff's complaint for lack of personal jurisdiction or to dismiss the complaint for failure to state a cognizable claim.

Plaintiff is a Pennsylvania corporation which produces and packages dairy products under the brand-name Sommer Maid for sale in the Middle-Atlantic region. Plaintiff alleges that Keller's is a Pennsylvania corporation and a division of

defendant SNAC. Plaintiff also alleges that SNAC is a wholly-owned subsidiary of defendant SODIAAL-France.

Plaintiff claims that it entered into an agreement with Keller's in 1989 or 1990 under which Keller's would package a substantial portion of Sommer Maid butter in exchange for a transfer of plaintiff's equipment to Keller's. Plaintiff also granted Keller's permission to order packaging materials from a third-party produced with other equipment owned by plaintiff. Keller's promised not to solicit plaintiff's customers and or target plaintiff's share of the parties' shared customers.

Plaintiff alleges that in 1993 defendants began soliciting business from plaintiff's customers in violation of its contract with Keller's.¹ Defendants also allegedly violated the parties' agreement by disclosing to plaintiff's customers that Keller's packaged plaintiff's product and by raising prices for products sold to plaintiff to rates higher than they charged other customers. Plaintiff claims that these actions were part of a concerted effort to drive plaintiff out of business.

SODIAAL-France argues that plaintiff has failed to show that SODIAAL-France has forum contacts sufficient to sustain personal jurisdiction. SODIAAL-France states that it is a

¹ Throughout its complaint, plaintiff refers to "defendants" collectively. It is unclear whether plaintiff is alleging that each defendant actually committed or abetted each act complained of or has simply used the collective term loosely and imprecisely.

cooperative headquartered in Paris and conducts no business within the United States.

Once a defendant asserts lack of personal jurisdiction, the burden is upon the plaintiff to make a prima facie showing with sworn affidavits or other competent evidence that such jurisdiction exists. See Time Share Vacation Club v. Atlantic Resorts, Ltd., 735 F.2d 61, 66-67 n.9 (3d Cir. 1984); Leonard A. Fineberg, Inc. v. Central Asia Capital Corp., 936 F. Supp. 250, 253-54 (E.D. Pa. 1996); Modern Mailers, Inc. v. Johnson & Quin, Inc., 844 F. Supp. 1048, 1051 (E.D. Pa. 1994). To make such a showing, a plaintiff must demonstrate "with reasonable particularity" contacts between the defendant and the forum sufficient to support an exercise of personal jurisdiction. Mellon Bank (East) PSFS Nat'l Assoc. v. Farino, 960 F.2d 1217, 1223 (3d Cir. 1992).

Plaintiff asserts that SODIAAL-France is the owner of defendant SNAC and "is responsible for SNAC's activities within the State of Pennsylvania." While not pled with the greatest precision or clarity in its complaint, plaintiff essentially contends that SODIAAL-France controls SNAC to such a degree that SNAC's forum contacts can be imputed to SODIAAL-France.

The forum contacts of a corporate defendant may be attributed to a related corporation when one is the alter ego of the other. See Arch v. American Tobacco Co., 984 F. Supp. 830,

837 (E.D. Pa. 1997); Brooks v. Bacardi Rum Corp., 943 F. Supp. 559, 562 (E.D. Pa. 1996). That two corporate entities have a close relationship or coordinate and cooperate with each other, however, is not alone sufficient to show alter ego status. See Katz v. Princess Hotels Int'l, Inc., 839 F. Supp. 406, 410-11 (E.D. La. 1993); Hopper v. Ford Motor Co., Ltd., 837 F. Supp. 840, 844 (S.D. Tex. 1993). The disregard of corporate independence or the exercise of pervasive control by one over the other can be sufficient to show alter ego status for the purpose of imputing forum contacts. See Arch, 984 F. Supp. at 837; Brooks, 943 F. Supp. at 562-63.

Plaintiff presents an affidavit of Gary Rhodes, the CEO of SNAC from June 1993 through August 1996. Mr. Rhodes swears that he was hired into his position by R. Brzuszczak, SODIAAL-France's Division President, and other executives of SODIAAL-France. Mr. Rhodes avers that as CEO of SNAC he took direction from and reported directly to Mr. Brzuszczak. Plaintiff also submits an affidavit of Richard Sterling who applied in 1993 for the position of President/CEO of SNAC. Mr. Sterling avers that he was told by Mr. Brzuszczak that whoever was chosen for the position at SNAC would report directly to SODIAAL-France. Plaintiff has submitted a copy of a letter from Mr. Brzuszczak on SODIAAL-France letterhead and copies of memoranda which suggest that Mr. Brzuszczak exercised significant control over SNAC'S CEO

and operations and even had to approve salary and wage increases for SNAC personnel.² Also, movant has submitted affidavits with conflicting averments regarding the ownership of SNAC.³

While the evidence submitted by plaintiff to date does not conclusively establish personal jurisdiction over SODIAAL-France, it suggests the existence of a significant interrelationship between the parties. In such circumstances, further inquiry and discovery is warranted in assessing a claim of lack of personal jurisdiction. See, e.g., Marine Midland Bank NA v. Miller, 664 F.2d 899, 904 (2d Cir. 1981); Katz, 839 F. Supp. at 411. The court will permit plaintiff and SODIAAL-France sixty days to conduct discovery on matters relevant to the presence or absence of personal jurisdiction in this district over SODIAAL-France.⁴

² Movant suggests that Mr. Brzuszczak engaged in this activity as a director of SNAC to whom the other directors delegated management oversight authority. Of course, that a SODIAAL-France executive was simultaneously a director of SNAC and effectively making decisions ordinarily made by corporate officers or the board as a whole would hardly undermine plaintiff's claim of alter ego status.

³ One affiant avers that "SODIAAL-France does not own any stock in SODIAAL North American Corporation ('SNAC')" while another avers that "Societe de Diffusion Internationale Agro-Alimentaire ('SODIAAL-France') is the sole owner of the SNAC business and elects the Board of Directors of SNAC."

⁴ The court recognizes that evidence related to personal jurisdiction over SODIAAL-France will likely also be pertinent to the substantive claims asserted against all defendants. In any event, it is contemplated that jurisdictional discovery will proceed concurrently with substantive discovery between plaintiff and the other defendants.

SODIAAL-France's contention that service of process was defective rises or falls with the nature of its relationship with SNAC and thus similarly can be evaluated only after the conclusion of jurisdictional discovery. Plaintiff purported to effect service upon SODIAAL-France by delivering the appropriate documents to SNAC. Movant argues correctly that the Hague Convention generally governs service upon foreign entities. Service in the United States upon the agent of a foreign corporation, however, is sufficient. See Sankaran v. Club Mediterranee, S.A., 1998 WL 433780, *5 (S.D.N.Y. July 31, 1998). Service upon a subsidiary constitutes service upon a parent corporation, however, only when the plaintiff can show that the subsidiary is the parent's "agent or alter ego." See Mirrow v. Club Med, Inc., 118 F.R.D. 418, 419-420 (E.D. Pa. 1986); Akzona Inc. v. E.I. DuPont de Nemours & Co., 607 F. Supp. 227, 240 (D. Del. 1984).

Defendant does not contend that plaintiff has failed adequately to plead cognizable legal claims and indeed the other defendants have not filed a motion to dismiss for failure to state a claim. Rather, SODIAAL-France's Rule 12(b)(6) motion is premised on the contention that the alleged acts which would support plaintiff's claims were not committed by movant but by the co-defendants.⁵ As plaintiff's attempt to impose liability

⁵ Defendant SNAC has answered plaintiff's complaint for itself and on behalf of Keller's which SNAC represents consists of two unincorporated divisions of SNAC.

on movant appears essentially to be predicated on its control over and direction of SNAC's affairs, the court cannot now conclude that it clearly appears beyond doubt that plaintiff will be unable to show it is entitled to relief against SODIAAL-France.

ACCORDINGLY, this day of August, 1998, upon consideration of defendant Societe de Diffusion Internationale Agro-Alimentaire's Motion to Dismiss (Doc. #6), and plaintiff's response thereto, **IT IS HEREBY ORDERED** that said Motion is **DENIED** without prejudice to renew by November 6, 1998, ten days after the close of the sixty day jurisdictional discovery period provided by the court in an accompanying order of this date.

BY THE COURT:

JAY C. WALDMAN, J.